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RECORD NO. 90-1858

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

JAMES E. BAYLOR, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") erred in failing to remand the case of the Petitioner, a white defendant, to the United States District Court for the Eastern District of Virginia ("District Court") based on a Batson violation when the Fourth Circuit, in the same appeal proceeding, remanded the cases of Petitioner's two Co-Defendants, who are black, to the District Court based on a Batson violation?

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PETITIONER'S RESPONSE TO THE GOVERNMENT'S ARGUMENT

The United States ("Government") acknowledges in its Brief in Opposition ("Government's Brief") that Petitioner raised the Batson[1] issue in the joint brief of Petitioner, Joe and Skeeter, and in Petitioner's Separate Brief to the Fourth Circuit. See Government's Brief p. 6-7, f.n. 3. The Government asserts as its sole ground for denying the Petition for Writ of Certiorari that Petitioner waived his Batson claim by failing to raise it in the District Court. See Government's Brief at p. 6.

The Government's claim that the Petitioner waived his Batson claim by failing to raise it in the District Court is not supported by the record or the law. The record reveals Petitioner did raise the Batson issue in the District Court. At the January 17, 1990 post-

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

trial hearing, counsel for Joe made several arguments for reversing the convictions of Joe, one of which was a very comprehensive and all inclusive Batson argument. See 1/17/90 Tr. 7-38. After Joe's counsel concluded his arguments, Petitioner's counsel was finally given the opportunity to argue on behalf of the Petitioner. Petitioner's counsel began his argument by making some brief opening remarks and expressly stated "I would also like to join in all the motions and arguments of co-counsel or counsel for Morgan Joe and adopt those where applicable to Mr. Baylor." 1/17/90 Tr. 132.

The Batson argument made by Joe's counsel is clearly applicable to Petitioner in light of this Court's decision in Powers v. Ohio, 111 S.Ct. 1364 (1991).[2] Accordingly, the

[2]In addition, on June 23, 1989 Petitioner filed a pre-trial Notice of Motion to join all other motions and arguments submitted by his co-defendants which were not inconsistent with the motions advanced by Petitioner.

issue was timely raised in the District Court.[3]

Assuming arguendo that Petitioner did not affirmatively preserve the Batson issue in the District Court for appeal, the Government's argument that Petitioner waived his Batson argument is also unsupported by the law. At the time the jury was sworn in this case (October 30, 1989) and at the time that the

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Accordingly, all the Batson arguments made by Petitioner's co-defendants, pre-trial and post-trial, should also be deemed to have been made by Petitioner.

[3]This Court has refused to set forth a specific time when a Batson objection must be made to be considered timely. See Batson, 476 U.S at 99-100; Ford v. Georgia, 112 L.Ed.2d 935, 948-950 (1991). Although the Fourth Circuit has recently held that a Batson objection is waived if not timely raised, Clark v. Newport News Shipbuilding and Dry Dock Company, No. 90-2361 (4th Cir. June 19, 1991); at the time Petitioner was tried in the District Court, the Fourth Circuit had not espoused any specific time for raising a Batson objection. Accordingly, even if Petitioner is deemed to have not raised the Batson issue until the post-trial hearing on January 17, 1991, his Batson objection should be deemed timely. See Ford v. Georgia, 112 L.Ed.2d at 948-950.

post-trial Batson arguments were made in the District Court (January 17, 1990 and January 18, 1990), this Court had not yet held, as it did in Powers v. Ohio, well over a year after Petitioner was sentenced by the District Court, that a white defendant in a criminal case has standing to raise the third party equal protection claims of black jurors precluded by the prosecution, through peremptory challenges, from serving on the petit jury solely on account of their race.

This Court has clearly stated that the standard to be applied by the federal courts in determining whether a waiver of constitutional rights has occurred, is whether there was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see also, United States v. Ferguson, 758 F.2d. 843, 852 (2nd Cir.), cert. denied, 474 U.S. 841 (1985) (Courts do not look with favor on a waiver of constitutional rights and do not

presume acquiescence in the loss of fundamental rights; citing Johnson v. Zerbst); Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915, 927 (4th Cir. 1965) (Defendant's failure to object at trial to evidence admitted which was procured by a constitutionally impermissable search was not deemed waived. At the time of defendant's trial, the United States Supreme Court had not yet overruled its decision in Wolf v. People of State of Colorado, 338 U.S. 25 (1949) with its decision in Mapp v. Ohio, 367 U.S. 643 (1961). Accordingly, defendant did not know he had the right to object to the admissability of the evidence.)

Because at the time that the jury was sworn in the District Court and at the time the post-trial Batson arguments were made, Petitioner did not know that he had the right, privilege, or standing to raise a Batson objection, due to the fact that this Court had not yet held that a white defendant has the

right to make such an objection, Petitioner could not and did not waive that right.[4]

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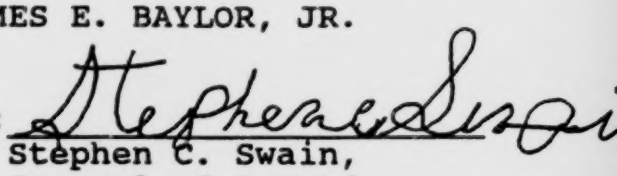
[4]Government argues that Petitioner intentionally failed to join in his Co-Defendants' Batson Motion because "he had a strategy for jury selection that diverged from that of his black Co-Defendants; Petitioner's aim was not to have blacks on the jury." Government's Brief, pg. 9. Although it is true that Petitioner's counsel argued for a severance at trial, in part on the basis that his strategy would be not to have black jurors on the jury, once the District Court denied Petitioner's Motion for Severance, his strategy changed. In fact, the District Court gave the Defendants a total of twelve peremptory strikes. After lengthy consultation among all of the defense attorneys, defense counsel collectively made the decision concerning which jurors to strike. See 1/30/89 Tr. 17, 223, 227-228. If Petitioner's strategy differed with his black co-defendant's strategy at the time the jury was being selected, it would have been impossible for all three co-defendants to make a joint decision concerning which jurors to strike.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES E. BAYLOR, JR.

By: 
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